1980

John Joseph Madsen v. Darrell L. Clegg : Brief of Appellant

Utah Supreme Court

Clair M. Aldrich; Attorneys for Appellant Frank W. Ballard ; Attorney for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

JOHN JOSEPH MADSEN, :

Plaintiff and Appellant, :

v. :

Case No. 16887

DARRELL L. CLEGG, :

Defendant and Respondent. :

BRIEF OF APPELLANT

Appeal from the Judgment of the Fourth Judicial District Court for Utah County, Honorable David Sam, Judge.

Clair M. Aldrich
Aldrich & Nelson
43 East 200 North
Provo, Utah 84601
Attorneys for Appellant

Frank W. Ballard
381 West 2230 North
Suite 125
Provo, Utah 84601
Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

JOHN JOSEPH MADSEN,	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 16887
DARRELL L. CLEGG,	:	
Defendant and Respondent.	:	

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiff filed an action against the defendant to Quiet Title. Defendant counterclaimed on adverse possession or, in the alternative, boundary by acquiescence.

DISPOSITION IN THE LOWER COURT

The Trial Court found in favor of the defendant under the doctrine of Boundary by Acquiescence and entered a Judgment for the defendant.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Supreme Court reverse the decision of the Trial Court and to order a Judgment entered quieting title in the appellant.

STATEMENT OF FACTS

Plaintiff and defendant are the owners of adjoining parcels. The respective parcels have been in the Madsen and

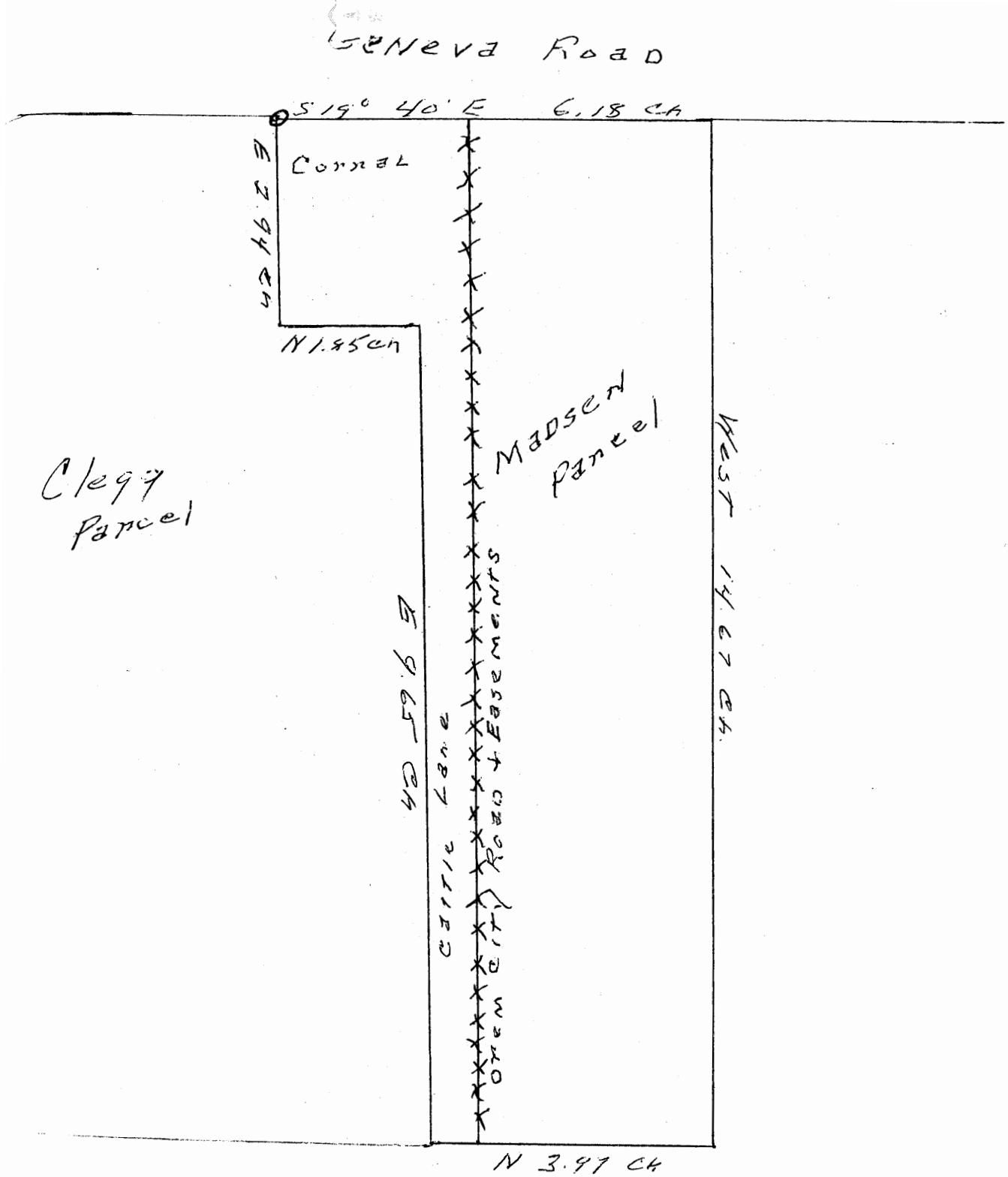
Clegg families since 1904. Plaintiff's father obtained Title to the Madsen tract from the Estate of Francis Armstrong by a Deed dated June 27, 1904, (Exhibit 2, page 18). On the same date, June 27, 1904, Willard J. Clegg, defendant's predecessor, obtained a Deed to his property from the Estate of the same Francis Armstrong, (Exhibit 8, page 15). The Clegg parcel abutted the Madsen property on the north. Each parcel contained a little more than six acres. The eastern portion of the Madsen property extended about 130 feet farther north than the western portion. When the Deeds to the two parcels came out from the common grantor, plaintiff's north boundary and defendant's south boundary fitted exactly together.

Madsen Description

> Commencing 16.893 chains South and 27.41 chains West of the Center of Section 21, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence along the West line of the County Road South 19° 40' East 6.18 chains; thence West 14.67 chains; thence North 3.97 chains; thence East 9.65 chains; thence North 1.85 chains; thence East 2.94 chains to beginning. 6.14 acres.
>
> (Exhibit 2, page 18)

Clegg Description

> Commencing 13.33 1/3 chains South of the quarter section corner between sections 20 and 21, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence East 11.33 chains; thence along the West side of the County Road South 19°40' East 3.75 chains; thence West 2.94 chains; thence South 1.85 chains; thence West 9.65 chains to the section line between sections 20 and 21; thence North 5.39 chains to the beginning. 6.72 acres.
>
> (Exhibit 8, page 15)



Note the sketch attached.

Shortly after he acquired his property the plaintiff's father installed a fence on his property which ran in a generally east-west direction. The fence was approximately 25 feet south of his north Deed line on the western portion of the property and about 155 feet south of his north property line on the eastern portion of the land, (TR., pp. 7, 8, 9 and the Survey, Exhibit 3). There was a corral with sheds on the north-eastern portion of the land. The corral was surrounded with a barbed wire fence and that fence continued on to the west along the title line providing a cattle lane to connect with other property owned by Madsen and abutting the property in question on the west side, (TR., p. 21). In the early 1930's the corral became too wet and the corral was moved to the other property owned by the Madsens across the road to the east, (TR., pp. 9, 21). After the corral was moved the Madsens farmed the corral property for a few years with sugar beets, (TR., p. 21).

In 1936 the plaintiff's father went to work full time for the Utah Fish and Game Department, (TR., p. 9), and from 1936 until about 1942, the farm was rented out to various people including Jim Blake and Joy Clegg, who was defendant's uncle, (TR., p. 9). The plaintiff acquired the property in 1942, (TR., p. 10). The corral fence and the north property line fence were taken down sometime during the period that the land was rented out (TR., p. 25).

In 1945 plaintiff entered into an agreement with Orem City under the terms of which the City obtained a drainage-line easement across plaintiff's property. The line ran in an east-west direction clear across the land and was situated south of the barrier fence erected by his father in 1904. The only consideration which plaintiff received for the easement was that the line would be at least six feet deep and would have open joints with rocks around the joints so that it would drain his lands on both sides of the drain, (TR., pp. 20-21).

The plaintiff later gave a sewer-line easement and deeded a roadway 25 feet wide to Orem City along about the same line as the earlier drainage line. He wanted to protect the size of the corral parcel, which abutted on Geneva Road, for commercial or residential useage. He could then provide a wider road leading to other property of his by utilizing the cattle lane 25-foot strip in conjunction with the Orem City Road, (TR., p. 18).

Although the plaintiff did not farm the disputed area after he bought it in 1942, he did go upon that ground to trap muskrats, (TR., pp. 25, 61).

The Madsen's and the Clegg's never agreed that the 1904 fence was a boundary line between their properties, (TR., pp. 21, 22).

The defendant would not characterize the fence as a "Boundary Line," (TR., p. 14).

Plaintiff's six-acre plus parcel was mortgaged a number of times between 1910 and 1942, (TR., p. 23).

In the late 1950's or early 1960's plaintiff secured a well permit from the State Engineer for seven homes on his parcel, (TR., p. 17), and (Exhibit 7). He didn't build the seven homes because the County changed the zoning laws to 20 acres to a home, (TR., p. 23).

Defendant did not pay taxes on the property for the required seven years. He had paid on his present tax description only since 1973, TR., pp. 34, 39, (6 years). For the ten-year period preceding 1979, the plaintiff had paid the taxes on the area in dispute first, (Exhibit 4).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT THE DEFENDANT HAS ACQUIRED THE LAND IN DISPUTE UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.

The doctrine of Boundary by Acquiescence does not apply to the facts in this case.

Here it is undisputed that the fence line in question was put in by plaintiff's father in about 1904 to provide a fence for an existing corral and to provide for a cattle lane so that the livestock could be driven to and from other lands owned by him, situated to the west of the land upon which the fence was built. At that time a fence existed along the north property line of his parcel, (TR., p. 21). The new fence was about 25 feet south of the north property line in the westerly

portion and about 155 feet south of his north property line along the eastern portion, (Exhibit 3).

The corral and cattle lane were used by the Madsens until the early 1930's when the area became too wet and they then moved the corral to property they owned across the street east, (TR., pp. 9, 21). After the corral was moved, the Madsens farmed the corral piece until plaintiff's father went to work for the Fish and Game Department in 1936, (TR., p. 21). From 1936 until plaintiff purchased the property from his father in 1942, the farm was rented to various tenants, including James Blake and Joy Clegg, who was defendant's uncle, (TR., p. 9). The corral fence and the north property line fence were removed during the period the farm was rented out, (TR., p. 25). For some years after he acquired the property, plaintiff used it for the purpose of trapping muskrats, (TR., pp. 25, 61). The area in question is 1.14 acres and is about 18% of plaintiff's six-acre parcel.

A fence may be maintained between adjoining proprietors for the sake of convenience without the intention of fixing a boundary and acquiescence in the existence of a fence as a mere barrier does not preclude the parties from claiming up to the true boundary line. (FLORENCE v. HILINE EQUIPMENT COMPANY, Utah, 581 P. 2d 998).

Here, the fence in question was built as a barrier to contain livestock. It was a fence within the original boundary line fence. The boundary line fence was in place when the Madsens

and the Cleggs bought their respective parcels and remained intact until sometime after 1936. No one but the Madsen family and the Clegg family have ever owned either parcel since 1904. Where a fence is built for the some purpose other than a boundary, the parties can claim to the true boundary line, and there can be no boundary by acquiescence. (HALES v. FRAKES, Utah, 600 P. 2d 556).

The defendant contends that the plaintiff recognized the fence line as a boundary line when he gave Orem City an easement on the south side of the fence in 1945 for a drainage line, and also when, in later years, he gave Orem City an easement for a sewer line and sold the City a roadway of about 25 feet in width. Plaintiff testified that the original drainage line was put there because (1) that is where Orem City wanted it; (2) that the only consideration he received from the City was that the line would be at least six feet deep with open joints with rocks around the joints so that it would drain plaintiff's land on both sides of the line; and (3) by putting the drain there it would preserve the size of the corral property for future commercial or residential use, (TR., p. 18).

In 1955, plaintiff intended to develop his six-acre parcel, including the land in dispute, into seven residential lots. He applied to the State Engineer for a well permit to furnish water for seven homes on that land, and his application was approved, (Exhibit 7). About that time the County changed

its zoning ordinance and required larger acreage per County lot, and he could not get his building permits, (TR., p. 17).

A person should be presumed to claim title to all of the land called for in his Deed unless it clearly appears otherwise. (BROWN v. MILLINER, 232 P. 2d 202, at 208).

The testimony of the abstractor witness, Mr. Barret, should be disregarded. He was not an Engineer, (TR., p. 32) and he was moving the position of the land on the ground each time the County Surveyor had made a change in the section line closure. See AFFLECK v. MORGAN, Utah, 364 P. 2d 663.

Exhibit No. 3 is a survey prepared by a registered Civil Engineer giving a legal description of the property in dispute after adjusting his starting point to conform to the section line closure adjustments that had been made up to the year 1979.

POINT II

BOUNDARY BY ACQUIESCENCE IS AN EQUITABLE DOCTRINE AND THE SUPREME COURT CAN REVIEW QUESTIONS OF BOTH LAW AND THE FACTS.

In an equity matter the Supreme Court can review the evidence, and where, as in this case, the determination of the Trial Court is clearly contrary to the weight of the evidence, the decision should be reversed. Equity would not be served in this matter by awarding the defendant some 18% of plaintiff's six-acre parcel.

CONCLUSION

The decision of the trial court should be reversed and it should be ordered to enter judgment in favor of the plaintiff.

Respectfully Submitted,

Clair M. Aldrich
Aldrich & Nelson
43 East 200 North
Provo, Utah 84601
Tel: 373-4912
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of April, 1980, I personally caused to be mailed, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant to Frank W. Ballard, Attorney for Respondent, 381 West 2230 North, Suite 125, Provo, Utah 84601.

Clair M. Aldrich